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# ON JUSTICE AND WAR: CONTRADICTIONS IN THE PROPOSED MILITARY TRIBUNALS

GEORGE P. FLETCHER\*

The autumn of our anguish has passed, and we are still confused about how to describe the use of military force in Afghanistan. We are torn between using the language of justice and the language of war. Is this an attack by private individuals, a case of a single terrorist writ large? If the mass killings of September 11 are the crimes of individuals—Islamic fundamentalist versions of Timothy McVeigh—then we can think about arresting them and bringing them to “justice.” The mantra of the Bush team, “bringing justice to them and them to justice,” has seeped through the media and become part of the standard discourse of people thinking and writing about the war.

Yes, the war. What else should we call the military response to one of the most serious attacks ever executed on the soil of the United States? From its initial pronouncements, the White House has found it easy to invoke the rhetoric of armed aggression and collective self-defense. This has been a war in anyone’s book except perhaps in the minds of traditional international lawyers who claim that you cannot fight a war against a nonstate organization.<sup>1</sup>

Justice and war: how well do they sit together? The former is about restoring moral order in the universe. The latter is about securing the survival and achieving the partisan goals of a particular nation. And yet we want to think that this war, in particular, is about pursuing justice. The targets and the arguments, however, are different, depending on whether the agenda is justice or war. If our goal is doing justice, then we

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1. The falsity of this is evident in the recognition of a *de facto* state of war during the Civil War in Bosnia in the 1990s. *See* *Karadzic v. Kadic*, 70 F.3d 232, 237 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

should focus on the individual culprits. If the point is to execute and win a war, then the primary concern should be our military objectives. The discourse of war suppresses the identity of particular actors in the aims of a collective military force. We were not concerned about the individual Japanese pilots who returned safely from the attack on Pearl Harbor. They were not criminals but rather agents of an enemy power. They were not personally "guilty" for the attack, nor were their commanders, who acted in the name of the Japanese nation. Yet somehow we think things are different today. Individual soldiers cannot lose their identity in a collective movement. They remain potentially liable to be brought to "justice" for their actions. We should ponder whether this is a coherent and consistent way of thinking about armed conflicts in our time.<sup>2</sup>

The arguments of justice are retrospective. They aim to set the scales aright. If we have lost five thousand people, the principles of retribution, or justice in punishment, require that our attackers should too. The principles of warfare, however, are entirely prospective. The way to see the difference is to suppose that the entire infrastructure of the terrorist movement suddenly surrendered or to imagine that they credibly pledged never to attack again. Would we have any justification for harming a single soul? Yes, in the pursuit of justice. No, in waging war.

In addition to our conceptual dance around the poles of justice and war, other metaphors have entered our conceptual space since September 11. Anne-Marie Slaughter has argued that the proper analogy is between the attackers of September 11 and the pirates of old.<sup>3</sup> I see no appeal to this analogy except that the word "piracy" is mentioned in the Constitution as a fit object of Congressional penal legislation.<sup>4</sup> Pirates rob for loot; they seek lucre on the high seas, where no state can claim territorial jurisdiction. The presumed enemies of September 11 have plenty of cash; they act not for profit, but for the sake of

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2. I consider the possibility of prosecuting combatants for war crimes in violation of international criminal law *infra* note 14 and accompanying text.

3. Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23 ("Al Qaeda members are international outlaws, like pirates, slave traders or torturers.").

4. Congress has the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

glory and their conception of God. They commit crimes on national territory, where courts should be operating. True, the prosecution of pirates has some resonance in international law. Under the principle of universal jurisdiction, all states, including the United States, can punish piracies committed on the high seas.<sup>5</sup> If the United States acquires custody over bin Laden or his top lieutenants, however, the government would have no problem indicting them for conspiracy to commit murder in the state of New York. We have little need for an analogy to pirates to justify jurisdiction for murder committed on the territory of the prosecuting state.

Equally inapt is the frequent analogy to Al Qaeda as "outlaws."<sup>6</sup> Outlaws inhabit a twilight space outside the legal order, and they are subject to being shot at will. The idea of killing enemy soldiers on the spot is compatible neither with the pursuit of justice nor with the laws of war. The outlaw is subhuman, undeserving of minimally decent treatment. I do not think we really want to make that claim about terrorists.<sup>7</sup> Nor does it make sense to flatter terrorists by associating them with romantic outlaws who retreat from society to live, metaphorically, with Robin Hood in Sherwood Forest. The purpose of thinking legally about the events of September 11 should be to help describe the danger we confront and to provide a justification, so far as possible, for the shared sentiment that the use of force is an acceptable response.

Unfortunately, we are in a state of collective confusion, not knowing whether to favor the ideas of justice or the principles of war, to adopt the analogy to piracy, or to resort to branding the enemy as "outlaws." Our conceptual waffling has become dangerous, for at the same time that we cannot articulate what we are doing, we believe strongly that we must be doing the right thing. The Presidency, the media, and most people one meets, it seems, now participate in the great patriotic fervor that has gripped the United States. I have no objection to

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5. *See id.*

6. *See Slaughter, supra* note 3.

7. *See Johnson v. Eisentrager*, 339 U.S. 763, 768-69 (1950) ("Modern American law has come a long way since the time when outbreak of war-made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder.").

patriotism,<sup>8</sup> and I think it is proper to describe our state of military engagement as a war. This description, however, is clearly not shared by those who insist on thinking of the conflict as the pursuit of justice, the searching for pirates, or the liquidation of outlaws. We cannot agree on what we are doing, other than to affirm that it is the right thing to do! With this degree of conceptual fusion, and, one might add, arrogance, we run the risk of committing great moral and legal error.

A sign of error appeared on November 13 when President Bush issued an order establishing military tribunals to prosecute enemy terrorists who come into our custody.<sup>9</sup> Civil libertarians have criticized the order as a deprivation of basic constitutional rights, such as an independent court, a jury trial, an appeal to independent judges, and a right to have full access to the evidence used to support a conviction.<sup>10</sup> The Military Order deprives individuals of all these rights, and the critique of these repressive procedures is clear to anyone trained in the law.<sup>11</sup> The most disturbing fact, however, is that the President and his Cabinet are fully aware that they are cutting back on basic rights of due process, and yet they proceed.

In the move to establish these tribunals, we can understand the peculiar advantage of trying to think of the military operation in Afghanistan as both the pursuit of justice and the execution of war. The military tribunals look like a means to bring culprits to justice. The Military Order purports to

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8. See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 101-24 (1993).

9. See Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

10. See Nat Hentoff, *Terrorizing the Bill of Rights*, VILLAGE VOICE, Nov. 20, 2001, at 32; see also Alan Dershowitz, *Bring Him to Justice in the U.S.*, L.A. TIMES, Nov. 19, 2001, at B13. Kudos to William Safire who was the first to blow the whistle on the tribunals:

Misadvised by a frustrated and panic-stricken attorney general, a president of the United States has just assumed what amounts to dictatorial power to jail or execute aliens . . . . We are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts . . . . In an Orwellian twist, Bush's order calls this Soviet-style abomination "a full and fair trial."

William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31.

11. It is disquieting, however, to hear so many people express sympathy with the current curtailment of civil liberties. See Pam Belluck, *Hue and Murrur Over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8 (reporting on the views of Laurence Tribe and Michael Dorf).

guarantee "a full and fair trial"<sup>12</sup> with the right to assistance of counsel. Yet a similar tribunal would be unthinkable as a way of catching and prosecuting a Mafia chieftain or an ideological killer like Timothy McVeigh. What is the difference with regard to international terrorists? One is tempted to say, "It is the war, stupid." Bombing Afghanistan supposedly creates a practical necessity to circumvent the processes of justice that ordinarily apply to crimes committed in the United States. As President Bush was quoted one week after issuing the order, "the option to use a military tribunal in a time of war makes a lot of sense."<sup>13</sup>

Through invoking the language of war, the President has ignored an important principle of the law that has always governed our military conflicts. If the "individuals" detained as combatants engaged in fighting for the enemy, they are entitled to treatment as prisoners of war.<sup>14</sup> They cannot be tried for acts of violence that are normal and standard in fighting wars, and they must be released when hostilities cease. As combatants they may be liable for war crimes but not for violations of the criminal code of the country they have attacked. Yet one can imagine the Administration's response to this critique: "this is not really a war; this is bringing them to justice." This is the great advantage of conceptual confusion. When it suits its purposes, the administration justifies its actions as the pursuit of justice; if the justice argument fails, the move is to think in the language of war and collective self-defense.

We see both of these arguments interwoven in the "findings" that provide the basis for the Military Order. On the one hand, there is an emphasis on the "individuals acting alone and in concert" who "have carried out attacks on the United States," diplomatic and military personnel and facilities abroad and on citizens and property at home.<sup>15</sup> The purpose of the order, however, is not to punish these perpetrators of the past, but rather to "protect the United States and its citizens."<sup>16</sup>

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12. Military Order, *supra* note 9, §§ 4(c)(2), 4(c)(5), at 57,835.

13. Paul Leavitt & Kevin Johnson, *Bush Says Military Tribunals Necessary "In Time of War,"* USA TODAY, Nov. 20, 2001, at 5A.

14. See *Ex parte Quirin*, 317 U.S. 1, 34 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces.").

15. Military Order, *supra* note 9, § 1, at 57, 833.

16. *Id.*, §1(e), at 57,833.

The constitutionality of the proposed tribunals is far more complicated than meets the eye. To analyze the issues properly, we should take a closer look at the Military Order in light of two cases in which the Supreme Court upheld military tribunals, namely, *Ex parte Quirin*,<sup>17</sup> which upheld the tribunal based on the Executive Order issued by President Roosevelt on July 2, 1942;<sup>18</sup> and *In re Yamashita*,<sup>19</sup> which upheld the tribunal invoked by Lieutenant General Wilhelm Styer, the post-war commander in the Philippines. Both of the tribunals in question sentenced men working for the Germans and the Japanese, respectively, to death by hanging. If these cases are sound precedents for the Military Order, the order is clearly constitutional. We should be mindful, also, of the decision in *Ex parte Milligan*<sup>20</sup> in which as early as the Civil War, the Court established the important principle that military authorities must defer to civilian courts in areas where the latter are functioning and can exercise jurisdiction.<sup>21</sup> Against the backdrop of these precedents we shall find that the Military Order does not fare well, and that neither *Quirin* nor *Yamashita* provides a basis for upholding the proposed tribunals as constitutional.

The Military Order contains findings of fact, a determination of the persons subject to the order, procedures for detaining these persons, and finally, the procedures for trying them "for any and all offenses triable by military commission."<sup>22</sup> In order to grasp the full significance of the details in the lengthy Military Order, which consists of some 1800 words, let me establish some points of comparison by setting forth the presidential order upheld by the Supreme Court in *Quirin*

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17. 317 U.S. 1 (1942).

18. Proclamation No. 2561, 3 C.F.R. § 309 (1938-1943), reprinted in 10 U.S.C. § 906 (1994).

19. 327 U.S. 1 (1946).

20. 71 U.S. 2 (1866).

21. The *Milligan* principle was upheld and applied in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), which held that the Governor of Hawaii had no congressional or constitutional authorization for declaring "martial law" and displacing the civilian courts with military tribunals.

22. Military Order, *supra* note 9, § 4(a), at 57, 834.

("Roosevelt Order").<sup>23</sup>

Whereas the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war.

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution, and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; [and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.]<sup>24</sup>

Roosevelt issued this order to provide a legal basis for trying eight men already in custody. They were German nationals who landed in June 1942 off the coasts of Long Island and Florida and fanned out around the United States, allegedly for the purpose of collecting information and committing acts of sabotage.<sup>25</sup> The FBI arrested them soon after their landing, and there was obvious uncertainty about whether they should be treated as prisoners of war or tried on criminal charges and, if the latter, about whether they should get a civilian or a military

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23. Because there was no executive order setting up the tribunal in *Yamashita*, the case poses entirely different issues, which I take up later.

24. Proclamation No. 2561, *supra* note 18, at 309. The portion in brackets was rendered invalid by *Ex parte Quirin*, 317 U.S. 1, 25 (1942), which recognized the capacity of the petitioners to seek a review of the applicability of the Executive Order to their case and to test the constitutionality of the Order.

25. On some of the curious details of this expedition, see William Safire, *Using Military Courts Harms the War on Terror*, INT'L HERALD TRIB., Nov. 27, 2001, at 9.



trial. On the basis of Roosevelt's order they were tried and convicted before a military tribunal, and six were sentenced to be hanged. The primary charge was spying in violation of Article 82 of the Articles of War then in force.<sup>26</sup>

Significantly, Article 82 provided the kind of legislative backup that was necessary to legitimize the Roosevelt tribunals under the Constitution. The statute, dating back to 1920, punished by the death penalty the undefined activity of spying in time of war, and it prescribed that the offense "shall be tried by a general court martial or by a military commission." We can assume that for these purposes the term "military commission" is equivalent to "military tribunal." At the time courts martial were appropriate only for crimes committed by members of United States armed services.<sup>27</sup> Therefore, for everyone else who commits the offense of spying in wartime, the statute mandates a military tribunal.

Of course, Congress cannot declare every offense to be subject to prosecution before a military tribunal and thereby dispense with trial by jury. Article III, Section 2 of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."<sup>28</sup> And the Sixth Amendment prescribes jury trial in all "criminal cases."<sup>29</sup> So if the deed in question is a *crime* under the laws of the United States, how could Congress authorize the President to provide for trial by military tribunal? The argument for different procedures in court martial cases turns, in part, on the explicit exception in the Fifth Amendment for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." One would think that one explicit exception would exclude all others, but in *Quirin*, the Supreme Court took a different line in seeking to uphold the military tribunal used against the eight German spies. The argument was that the constitutional provisions for jury trials were not meant to limit the common law practices of trying some cases

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26. The Articles of War, 10 U.S.C. §§ 1471-1593 (1940), since repealed, were directed primarily to the definition of offenses prosecuted by court martial.

27. Note that in a provision adopted in 1950 but not yet invoked (so far as I know), the military can invoke a court martial against a prisoner of war charged with a war crime. See 10 U.S.C. § 818 (1994).

28. U.S. CONST. art. I, § 2, cl. 3.

29. U.S. CONST. amend. VI.

without a jury. The Supreme Court has used this reasoning before to exempt petty offenses<sup>30</sup> and contempt proceedings<sup>31</sup> from trials by jury, and they felt justified in applying this line of thought in this case. *Quirin* concluded, therefore, that it is no more difficult than in cases of petty offenses "to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war."<sup>32</sup> As we shall see later, the key term in this formulation is the "law of war."

After preliminary findings of fact, the Roosevelt Order divides neatly into the following parts: (1) a claim of presidential authority to establish a military commission; (2) a definition of persons "subject to the law of war and the jurisdiction of military tribunals"; and (3) a recitation of the charges that might be brought against the persons so subject to the tribunals. Let me compare the Bush and Roosevelt orders in these three respects.

1. *Presidential Authority.* Even before considering constitutional limitations requiring trial by jury and other procedural protections not found in military tribunals, we have to ask an elementary question: where does the President get his authority to establish a tribunal and thereby circumvent the jurisdiction of the civilian courts? In the view of the Supreme Court, a congressional statute legitimated Roosevelt's establishment of military tribunals to try the eight German spies arrested in the United States.<sup>33</sup> The remarkable feature of the Military Order is that there is no comparable legislative mandate requiring military tribunals for any of the crimes that were committed on September 11. The order cites three specific statutory sources, but none of them mandates a military tribunal for any offense. The first, the joint resolution Congress adopted on September 18, 2001 authorizing the President to use all "necessary and appropriate force" against those responsible

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30. The well-accepted rule is that petty offenses, punishable by less than six months of imprisonment, are exempted, for historical reasons, from the constitutional requirement of a jury trial. To support this proposition, the *Quirin* decision relies on *Schick v. United States*, 195 U.S. 65 (1904).

31. The trend in the cases has been against special treatment of contempt charges. See, e.g., *Bloom v. Illinois*, 391 U.S. 194 (1968).

32. *Ex parte Quirin*, 317 U.S. 1, 41 (1942).

33. Other spies were tried as well under the same principle. See *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956).

for the September 11 attack, says nothing about tribunals or trials.<sup>34</sup> The other two are statutory references, 10 U.S.C. § 821 and § 836, which do refer to the existence of military tribunals but which fail to mandate or even authorize a military tribunal in any particular context.<sup>35</sup>

One is tempted to conclude that there is no legislative authority for the President's order. In light of Supreme Court precedent on military tribunals, however, this would be a hasty conclusion. In *Yamashita*, the Court upheld the military trial and conviction of a Japanese general charged with failing to supervise his troops and allowing them to engage in atrocities in the Philippines.<sup>36</sup> There was neither a congressional mandate nor a presidential order supporting the use of the tribunal. The United States general in charge of the post-war occupation of the Philippines, Wilhelm Styer, acting under General Douglas MacArthur, invoked the tribunal based upon the military's supposedly inherent authority.

For purposes of legitimating the Military Order, the most significant feature of the Supreme Court's decision in *Yamashita* was the casual way in which the Court's seven-vote majority justified the proceeding in a military tribunal. Justice Stone's opinion invokes a provision of the Articles of War—apparently a predecessor to 10 U.S.C. § 821, which the Military Order cites—that refers to the existence of military tribunals. This reference was sufficient to lead Justice Stone to write that the statute “incorporated, by reference . . . commissions created by appropriate military command . . . . It thus adopted the system of military common law applied by military tribunals. . . .”<sup>37</sup> If a commander in the Pacific can set up his own military tribunal and operate under a common law of military offenses, then surely the President, as Commander in Chief, can do the same thing.

Yet there is a critical difference between the situation in

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34. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

35. 10 U.S.C. § 821 (1994) provides that if military tribunals exist, they have concurrent jurisdiction with courts martial; 10 U.S.C. § 836 (1994) gives the executive branch the authority to deviate, when “practicable” from the Federal Rules of Evidence for military courts, including military tribunals.

36. *In re Yamashita*, 327 U.S. 1 (1946).

37. *Id.* at 7-8.

*Yamashita* and the circumstances underlying the proposed Military tribunals. The offenses committed in the Philippines were not subject to prosecution under American law in an American courtroom. Perhaps they could have been tried in the Philippines—and, in the future, in the International Criminal Court<sup>38</sup>—but there was no sense in which General Styer was trying to take a case away from the civilian courts in the United States. It was either prosecution in his tribunal or no American initiative at all.

This is not true regarding those complicitous in the attacks of September 11. They are liable for violations of American law, and therefore any attempt to prosecute them in a military tribunal requires an argument for why the suspects are not entitled to be tried, with full constitutional guarantees, in a Manhattan courtroom.

When there is this kind of conflict between military and civilian jurisdiction, the burden of justifying trials by military tribunals requires something much different from the argument, made in *Yamashita*, that the case is governed by the “system of military common law.” What is required is a rationale for military jurisdiction analogous to the argument made for subjecting members of the armed forces to court martial jurisdiction. There must be something about the status of the offenders that justifies taking the case away from the civilian courts. This brings me, then, to the second problem in the Military Order: the definition of the class of persons subject to military tribunals.

2. *Persons Subject to the Military Tribunal.* There are several models for the legitimate filtering off of classes of people and the denial to them of the constitutional protections of Article III and the Fifth and Sixth Amendments. The primary model is military jurisdiction by court martial, which is defined in great detail in the Uniform Code of Military Justice<sup>39</sup> and tested repeatedly in litigation against constitutional norms.<sup>40</sup> We have

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38. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

39. 10 U.S.C. 801-946 (1994).

40. Compare *Reid v. Covert*, 354 U.S. 1 (1957) (wife charged with killing soldier husband in England held not subject to court martial jurisdiction) with *Madsen v. Kinsella*, 343 U.S. 341 (1952) (wife charged with killing husband in Germany held properly convicted under German law as applied by a military court).

noted the constitutional basis for this exception for members of the armed forces and others closely associated to the military.

A second model is the classification made by the Roosevelt Order in 1942 and upheld in *Quirin*, namely, agents of nations with which we are at war acting as "unlawful combatants" in committing violations of the laws of war. In this context, the process of carving out an exceptional category of persons subject to military tribunals confronts challenges on two fronts. On the one hand, the argument is that these defendants should be treated as ordinary defendants in civilian criminal trials subject to the ordinary constitutional rules: if they are charged with violating the laws of the United States and they are not covered by court martial jurisdiction, they should be tried in the same manner as other criminal suspects. On the other hand, if they are agents of a foreign military organization and they are captured, they should be treated as prisoners of war, held in detention until the termination of hostilities. The Supreme Court found a path between these polar extremes by classifying the German spies as "unlawful combatants." The critical fact was that they entered the United States in civilian clothes and, therefore, could not be classified as combatants identified with an enemy army. This status justified an analogical extension of court martial jurisdiction.

A third model is provided in the *Yamashita* case, namely, officers and soldiers in enemy armies who commit crimes that fall outside the scope of American civilian jurisdiction.

The military tribunals imagined in the November 13 Executive Order conform to none of these three models. They are directed against all non-citizens engaged, directly or indirectly, in international terrorism.<sup>41</sup> Not only does the lumping together of all foreigners vastly exceed standards of relevance, but it also invokes a method of classification—citizen versus foreigner—that has no reasonable bearing on the supposed objective of protecting the United States against international terrorism. In the cases emanating from World War II, there were several United States citizens convicted by military tribunals—if they spied for Germany, the fact that they were Americans was irrelevant.<sup>42</sup>

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41. Military Order, *supra* note 9, § 2(a)(1)(ii), at 57, 834.

42. See *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956).

In recent years, the Supreme Court has sought to achieve equal protection for aliens under state law, and although some inequalities are tolerated under federal law, the rationale for those disabilities would hardly imply that the non-citizens were per se subject to different rules and different constitutional principles from those applicable to citizens.<sup>43</sup>

To grasp the implications of the Military Order, imagine that Timothy McVeigh and Ted Kaczynski had been foreigners and that after their killings, they tried to flee to Canada or Mexico. It would follow from the Military Order that they should be tried, without benefit of constitutional protections, by a military tribunal.<sup>44</sup> It seems obvious that this discrimination against foreign defendants would be unconstitutional.

Perhaps someone might argue that their actions did not amount to terrorism as we now understand the term. In fact, the concept of terrorism remains difficult to cabin in a general definition. Serious reflection about the concept would lead to treating McVeigh or Kaczynski as terrorists as easily as we would apply the concept to the aggressors of September 11.

The federal statutes have tried to stake out the contours of the concept of terrorism, but the results are not encouraging. The standard definitions of both international and domestic terrorism are found in 18 U.S.C. § 2331, as amended by the 2001 USA PATRIOT Act.<sup>45</sup> The basic definition of "domestic terrorism" now reads:

The term "domestic terrorism" means activities that—

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
  - (i) to intimidate or coerce a civilian population;

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43. The States may not discriminate against aliens in education, see *Plyler v. Doe*, 457 U.S. 202 (1982), or in welfare benefits, see *Graham v. Richardson*, 404 U.S. 365, 372 (1971) (considering aliens as a class a "discrete and insular" minority for whom heightened judicial scrutiny is appropriate), but the federal government derives some power of distinction based on its capacity to control immigration, see *Mathews v. Diaz*, 426 U.S. 67 (1976) (holding it permissible to deny Medicare benefits to non-citizens). There is no basis for thinking that this authority to treat aliens differently extends to any of the procedures guaranteed in criminal cases by the Fifth and Fourteenth Amendments.

44. For further details on the concept of international terrorism, see *infra* notes 47-48.

45. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 802, 115 Stat. 272, 376 (2001).

- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.<sup>46</sup>

Terrorism becomes international if, as the statute provides, there is a significant international component in the location of the crime, the intended victims, or the place of asylum.<sup>47</sup>

In order to generate a sound definition of terrorism or any other concept, one should begin with a few paradigm cases that everyone agrees constitute the core instances of the concept. One would think that the events of September 11 would exemplify terrorism. However, a close reading of the legislative definition suggests, surprisingly, that it may not cover the attacks on the Pentagon and the World Trade Center. Part (A), which requires a violation of the criminal laws of the United States is satisfied, but part (B), regarding the motive of the violence, is not so easily established. Was the purpose of the September 11 attack "to intimidate or coerce" the American public or to "affect the conduct of government"? One can say that the purpose of bombing Hiroshima was "to intimidate and coerce" the Japanese to surrender, but was this true about the attack on the Word Trade Center? Clearly, there was no expectation of surrender. In fact, no one knows what the masterminds of the attack wanted to achieve. The only apparent motive was to kill as many "infidels" as possible. That is not same thing as intimidating people for a political purpose. A better account of terrorism would stress not the element of coercion or intimidation, but just the opposite: "striking terror in the hearts of people" by their not knowing how to respond to the prospect of ongoing attacks.<sup>48</sup> Even with

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46. *Id.* § 802(a)(5), 115 Stat. at 376.

47. *See* 18 U.S.C. § 2331(c) (1994), *as amended by* USA PATRIOT Act § 802(a), 115 Stat. at 376 (defining international terrorism as violent acts that "occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum").

48. I am indebted to Herbert Morris for this clarification of terrorism, but another colleague, Steve Sheppard, disagrees with this assessment and in a personal conversation, which I quote with his permission, he offered this inimitable definition of terrorist violence: "it must scare the living shit out of people and instill fear that it will happen again."

a better definition, however, the concept of terrorism remains contested. There is an undeniable political element in the use of the term. Terrorism is never what *we* do (Hiroshima, Dresden), only what *they* do.

Thus we have an Executive Order designed to apply (1) just to foreigners who (2) engage in international terrorism. The first factor has no rational relationship to a group that might be properly targeted in the interests of American national security. The second factor builds the commission of criminal action into the definition of jurisdiction (an obvious circularity) and is too vague and contested to be taken seriously as a legitimate basis for exempting military tribunals from the constitutional protections prescribed in the Fifth and Sixth Amendments.

Even before turning to the question of the charges to be heard in the military tribunals proposed in the Military Order, we have to conclude that the tribunals would be unconstitutional.

Under the leading precedents, the President has no apparent authority to take these crimes away from the civilian courts, and the criteria governing persons subject to the order are both unconstitutionally discriminatory and excessively vague.

*3. Charges Subject to Trial in Military Tribunals.* There is much to be learned about the law of war from examining the Military Order's understanding of the law that would apply. The order refers vaguely to "violations of the laws of war and other applicable laws."<sup>49</sup> The other laws are presumably the statutes defining crimes against the United States, as implied by the current definition of terrorism in the USA PATRIOT Act.<sup>50</sup> In this conflation of two kinds of charges, we see the rhetorical advantages of mixing the conceptual frameworks of war and justice. If this is war, then the charges should be limited to violations of the laws of war. If this is the pursuit of justice, then it would be appropriate to recognize "other applicable laws" defining criminal liability. The implication of the statutes defining crimes against the United States, however, is that absent a sound constitutional exception, the trial must proceed according to the guarantees of the Fifth and Sixth Amendments.

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49. Military Order, *supra* note 9, § 1(e), at 57,833.

50. See Pub. L. No. 107-56, 115 Stat. 272 (2001).



There might be some solace for defendants under the Military Order if the potential charges were limited to crimes defined by the statutes of the United States, but there is little reason to think that the Bush Administration will confine its pursuit of "justice" to laws on the books. *Yamashita* demonstrates, to our chagrin, that aggressive tribunals can invent new offenses under a vaguely defined "law of war" that is part of a "military common law."

These offenses under the common law of war are so vaguely defined that they could not possibly meet the criteria of fair notice applied in criminal proceedings.<sup>51</sup> No one quite knows what the term "law of war" means. We do assume that the law of war is part of the law of nations and Congress has authority to define "Offenses against the Law of Nations,"<sup>52</sup> which means that Congress could define the law of war. There was a time when Congress took this task seriously, but since World War II, it has largely ignored the field.<sup>53</sup>

In the four-year period from *Quirin* to *Yamashita*, a subtle transformation in the law of war started to take form. Prior to World War II, violations of the law of war typically implied something like unfair fighting, typified by the crime of crossing enemy lines in civilian clothes and transmitting back information. This is essentially the crime charged against the eight German spies tried and convicted in *Quirin*. After World War II, beginning with the Nuremberg proceedings and the Japanese war crime trials, the "law of war" took on the connotation of war crimes that violated basic principles of morality and decency.<sup>54</sup> There was no violation of such principles by the Germans who spied in the United States—Americans would surely have done the same thing in enemy territory. In *Yamashita*, we begin to encounter the idea that the law of war is expressed in large part in war crimes, including

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51. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (finding no fair warning that trespass statute would apply to civil rights demonstrators); but cf. *City of Chicago v. Morales*, 527 U.S. 41 (1999) (upholding Chicago ordinance prohibiting "gang" loitering).

52. U.S. CONST. art. I, § 8, cl. 10.

53. So far as I can tell, the only crime in the law of war still on the books is the successor to the spying provision invoked in *Ex parte Quirin*, 317 U.S. 1 (1942). See 10 U.S.C. § 906 (2000).

54. Significantly, the Supreme Court never used the term "war crimes" prior to *Quirin*, 317 U.S. 1.

brutality against civilians and prisoners of war.<sup>55</sup>

The way to see the difference between these two bodies of law, both called the law of war, is to ask: between the offenses in *Quirin* and *Yamashita*, which would be subject to prosecution in the proposed International Criminal Court? The answer is immediate and revealing. It would never occur to anyone to prosecute the eight German spies as war criminals before the International Criminal Court,<sup>56</sup> though the behavior of General Yamashita would readily qualify as a war crime.<sup>57</sup> This is a remarkable shift in emphasis from "the law of war" as a set of rules about fair fighting to the "law of war crimes" as a set of norms about decent behavior toward civilians and prisoners of war.<sup>58</sup>

This shift in the nature of the law of war brings into relief the particular subtlety of joining the idioms of justice and of war in the public rationale for the war in Afghanistan. There is a sense in which those who were complicitous in the aggression of September 11 were guilty of war crimes by engaging in the large-scale killing of civilians, and it would make sense "to bring them to justice" before an international court or even in an American civilian court, in light of the current jurisdiction in federal courts over war crimes committed against American nationals.<sup>59</sup> This view, paradoxically, requires an affirmation that the state of armed conflict with Al Qaeda and the Taliban is in fact a "quasi-war." War crimes occur only in the course of collective armed conflict, international and sometimes intra-national.<sup>60</sup> They are not simply criminal actions by individuals,

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55. War crimes were tried prior to World War II, but no case reached the Supreme Court that addressed the legal aspects of prosecuting a war crime in the modern sense. On the historical aspects of war crimes, see ARYEH NEIER, *WAR CRIMES* (2d ed. 1992); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (3d ed. 2000).

56. The word "spy" does not appear in the Rome Statute, and there is no offense that comes close to the activities for which the German spies were executed.

57. The liability of commanders for atrocities committed by their men is recognized in Rome Statute, *supra* note 38, § 28(a).

58. According to a Lexis search of Supreme Court opinions, the term "war crime" in the current sense was not used prior to the opinion in *In re Yamashita*, 327 U.S. 1 (1946).

59. 18 U.S.C. § 2441 (1994) (prior to 1997, the crime was called a "grave breach of the Geneva Conventions").

60. See Rome Statute, *supra* note 38, § 8(b) ("international armed conflict"); *id.* § 8(c) ("armed conflict not of an international character"). On the collective nature of war crimes, see George P. Fletcher, *Romantics and Liberals at War: The Problem of*

even by conspiracies of individuals. If we affirmed the conflict as legally akin to a war, we could readily support the liability of Al Qaeda operatives as war criminals.

Thus, it would be possible to join the ideas of justice and war in charges of war crimes against those responsible for the September 11 attacks. The appropriate place to bring these charges would be an international tribunal established by the United Nations by analogy to the International Criminal Tribunals for Yugoslavia and Rwanda. There would be policy reasons, in addition, for favoring an international tribunal. The neutrality and international participation would bestow on the judgments much greater credibility than a partisan in the war could claim for itself.

If this ideal remains beyond our grasp, the second-best solution is prosecution in the state and federal courts of the United States. The problem is that these courts have to rely on defined state and federal offenses, which include war crimes only for the murder of American nationals. A federal prosecution would ignore the multinational nature of victims killed in the September 11 attacks.<sup>61</sup>

A third possibility, at least for those persons we are willing to regard as prisoners of war, is to invoke court martial jurisdiction under a 1950 innovation,<sup>62</sup> apparently not yet invoked, that permits courts martial to try prisoners of war for war crimes.

The worst prospect is the military tribunals as proposed in the Executive Order of November 13. Not only would these tribunals lack credibility and severely curtail the rights of criminal defendants, but their mere existence would also generate constant legal challenges, and we should not be surprised if the entire procedure is eventually declared unconstitutional.

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*Collective Guilt*, 111 YALE L.J. (forthcoming 2002).

61. See Fletcher, *supra* note 60.

62. 10 U.S.C. § 818 (1994).